STATE OF MAINE

SUPREME JUDICIAL COURT
OPINION OF THE JUSTICES
OJ-12-2

MEMORANDUM OF LAW SUBMITTED IN CONJUNCTION WITH QUESTIONS PROPOUNDED TO THE JUSTICES OF THE SUPREME JUDICIAL COURT BY THE MAINE HOUSE OF REPRESENTATIVES ON FEBRUARY 29, 2012

William J. Schneider
Attorney General

Linda M. Pistner
Chief Deputy Attorney General

Paul Stern
Deputy Attorney General

William H. Laubenstein, III
Assistant Attorney General

Six State House Station
Augusta, Maine 04333-0006
Tel. (207) 626-8800

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Texts

Miscellaneous

On February 29, 2012, the House of Representatives of the 125th Maine Legislature requested the Justices of the Supreme Judicial Court, pursuant to Article VI, section 3 of the Maine Constitution, to give their opinion regarding three referred questions related to the Treasurer of the State. On March 5, 2012, the Justices issued a Procedural Order inviting briefs on the request. The Attorney General submits the following memorandum to assist the Justices in resolving the questions presented.

BACKGROUND

Questions Presented

The request made by the House of Representatives to the Justices is as follows:

House Order Propounding Questions to the Justices of the Supreme Judicial Court

WHEREAS, it appears to the House of Representatives of the 125th Legislature that the following are important questions of law and that this is a solemn occasion; and

WHEREAS, the Constitution of Maine, Article VI, Section 3 provides for the Justices of the Supreme Judicial Court to render their opinion on these questions; and

WHEREAS, there is a question within the House of Representatives as to what activities constitute engaging in trade or commerce within the meaning of the Constitution of Maine, Article V, Part Third, Section 3; now, therefore, be it

ORDERED, that, in accordance with the provisions of the Constitution of Maine, the House of Representatives respectfully requests the Justices of the Supreme Judicial Court to give the House of Representatives their opinion on the following questions of law:

Question 1. Does mere ownership of business interests or stock by the Treasurer of State constitute engaging in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader as such terms are used in the Constitution

of Maine, Article V, Part Third, Section 3?

> Question 2. If the answer to Question 1 is in the affirmative, would the Treasurer of State be engaged in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader if the Treasurer of State did not manage or involve himself in the day-to-day activities of such business interests or stock?
>
> Question 3. If it is determined that the Treasurer of State has engaged in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader, does that finding affect or have an impact on the validity of the actions taken by the Treasurer of State in the performance of his official duties as used in the Constitution of Maine, Article V, Part Third, Section 3?

House Order 41 (125th Legis.)

Constitutional Provision

Article V, part three, section 3 of the Maine Constitution provides in its entirety:

> **Not to engage in trade.** The Treasurer shall not, during the treasurer's continuance in office, engage in any business of trade or commerce, or as a broker, nor as an agent or factor for any merchant or trader.

DISCUSSION

SOLEMN OCCASION

"The Maine Constitution requires the justices of the Supreme Judicial Court to answer the questions propounded by the Senate and House if they are important questions of law and present a solemn occasion. ME. CONST. art. VI, § 3." *Opinion of the Justices,* 2004 ME 54, ¶ 2, 850 A.2d 1145, 1147. It is "the first issue that must be addressed…." *In re Opinion of the Justices*, 2002 ME 169, ¶ 3, 815 A.2d 791, 794. "The matters with regard to which advisory opinions are proper are those of instant, not past nor future, concern; things of

live gravity." *In re Opinion of the Justices*, 191 A. 487, 488 (Me. 1936). This Office reluctantly questions whether important questions of law or a solemn occasion are present here because the questions presented do not identify any circumstances supporting either conclusion and the Justices should not have to search beyond the text of House Order 41 in order to determine that the questions are important or that a solemn occasion exists. The questions are vague, and identify no imminent need for the Justices to opine.

As presented, the questions put forward are vague generalizations. There is a factual background to these questions. *See e.g., Op. Me. Att'y Gen. 2012-2* (February 10, 2012) (Addendum ("Add.") 1). Neither that background nor an updated one, however, has been provided to the Justices, and the Justices do not consider matters not contained within the opinion request. Without specifics, the Justices are asked to opine upon hypothetical questions regarding a Treasurer's "ownership of business interests or stock" and "day-to-day" involvement or management of "business interests or stock." The Justices do not answer questions that contemplate action that is "too tentative, hypothetical and abstract." *See Opinion of Justices,* 330 A.2d 912, 916 (Me. 1975) (considering specific relationships to particular bank as a conflict of interest regarding pending nominee for position of Commissioner of Finance and Administration); *compare Opinion of Justices,* 339 A.2d 489 (Me. 1975) (not answering questions regarding hypothetical questions regarding qualifications for a Public Utilities Commissioner with no specific nominee), *with Opinion of Justices,* 340 A.2d 25, 28 (Me. 1975) (answering questions

regarding qualifications when a particular nominee is presented). The questions presented do not purport to be of any immediacy and they are not questions that can be answered by the Justices in the absence of the relevant facts necessary for the Justices to interpret the language of Article V, part 3, section 3.

The questions, moreover, do not present circumstances evincing a need for an opinion. The Treasurer's position is presently filled; there is no vacancy in the office nor questions regarding potential nominees. *Compare Opinion of Justices,* 330 A.2d 912 (Me. 1975) (considering conflict of interest issues regarding pending nominee for position of Commissioner of Finance and Administration). No legislative procedure for impeachment or address of the Treasurer has been commenced or finalized nor has any removal by the Governor been initiated. The Justices do not seem to have opined on a question regarding the removal of a state official unless the process at the very least has begun. *Compare Opinion of the Justices,* 343 A.2d 196, 201-202 (Me. 1975) (opining whether Governor and Council could proceed with removal process instituted by the Attorney General's presentation of a complaint seeking removal of District Attorney); *Opinion of the Justices,* 133 A. 265, 125 Me. 529 (1926) (opining on validity of completed proceedings to remove sheriff). And, these *Opinions* did not purport to deal with what sort of evidence fulfilled or might fulfill the burden for removal set forth in the law; rather, the two Opinions dealt exclusively with the propriety of the procedure used. *Id.*

In 1891, the Justices unanimously declined to opine on a question whether "a removal by the governor of a county attorney, upon proper charges, due notice and hearing … and the appointment of a proper person to fill his place, be valid?" *Opinion of Justices,* 27 A. 454, 85 Me. 545 (1891). The Justices succinctly explained:

> We are of the opinion that the facts stated do not indicate that any solemn occasion exists, within the meaning of the constitution of the state, which requires any expression of opinion of the court upon the question presented. Although the attorney is to be heard upon the charges against him presented to the governor, he cannot be heard upon the question submitted to us, and we think it inexpedient to prejudice the question before any occasion has arisen calling for its legal determination.
>
> We are more confirmed in this opinion in view of the late statute of the state upon the subject of the tenure of office under which, if the removal of such official be made, and another appointed, the legality of the removal can be immediately contested, by proceedings to be instituted before any judge in any county in the state where either party resides, in term time or vacation, any law questions arising to be speedily considered and determined by the law court.

Id. The Court itself seems to have considered the validity of a removal after-the-fact, but only on issues of process and authority, not regarding the meaning or weight of the evidence supporting removal. *Moulton v. Sculley,* 89 A. 944, 111 Me. 428 (1891); *but see Ex Parte Davis,* 41 Me. 38 (1851) (refusing to consider removal of a Justice of the Supreme Judicial Court "for want of jurisdiction").

QUESTIONS PRESENTED

In light of our view on the solemn occasion issue, this Office is reluctant to discuss the questions as presented. Since the Justices have invited briefs addressing the questions, however, we refer the Court to the Opinion of the Attorney General dated February 12, 2012, (Add. 1)[1] and to assist the Justices, the following discussion.

Historical Background

The text of Article 5, part 3, section 3 appeared in the draft of Maine's constitution presented to the convention and passed without debate. Tinkle, *The Maine Constitution, A Reference Guide* (1992) at 114. It has never been amended. *Id.*

It is not known what the specific origin of the section is. *Id.* However, the language of the provision prohibiting the Treasurer from engaging in the "business of trade or commerce" is very similar to a 1789 federal statute establishing the Department of the Treasury. Act of September 2, 1789, c. 12, 1 Stat. 65, 67. During the debate on the Treasury Department bill on June 29, 1789, Mr. Burke of South Carolina commented that he intended,

> to bring in a clause to be added to the bill to prevent any of the persons appointed to execute the offices created by this bill from being directly or indirectly concerned in commerce, or in speculating in the public funds, under a high penalty, and being deemed guilty of a high crime or misdemeanor.

[1] In order to assist the Justices, we are also attaching in the Addendum to this brief the hard-to-find documents referred to in this Opinion, as follows: 36 U.S. Op. Atty. Gen. 12 (April 18, 1929) (Add. 6); Op. Me. Att'y Gen. (January 23, 1923) (Add. 11); Op. Me. Att'y Gen. (December 1, 1978) (Add. 12).

1 Annals of Congress 635 (1822). On June 30, Mr. Burke introduced his amendment, which "after some alteration and addition proposed by Mr. FitzSimons and others, was made part of the bill." *Id.* at 639. As enacted, section 8 read:

> *That no person appointed to any office instituted by the Act, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce*, or be owner in whole or in part of any sea-vessel, or purchase by himself, or another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States, or take or apply to his own use, any emolument or gain for negotiating or transacting any business in the said department, other than what shall be allowed by law; and if any person shall offend against any of the prohibitions of this Act, he shall be deemed guilty of a high misdemeanor, and forfeit to the United States the penalty of three thousand dollars, and shall upon conviction be removed from office, and forever thereafter be incapable of holding any office under the United States….

1 Stat. 65, 67 (1789) (emphasis added). *See* now 31 U.S.C. § 329.

Modern scholarship attributes a "perceived connection between securities trading and political corruption" as the motivation for section 8. Banner, *Anglo-American Securities Regulation: Cultural and Political Roots, 1690-1860* (1998) at 161. The purpose of the section was to discourage speculation in public funds and lands by Treasury officials and to remove incentives for lax enforcement of law. "Congress thus tried to prevent insiders from being involved in *any* business." *Id.* at 162 (emphasis in original).

We have been unable to establish that section 8 of the 1789 Treasury Act was, in fact, the model for Article 5, part 3, section 3 of the Maine Constitution

adopted 30 years later. The language of Section 3 certainly suggests a connection.

> *The Treasurer shall not*, during the treasurer's continuance in office, engage in *any business of trade or commerce,* or as a broker, nor as an agent or factor for any merchant or trader.

(Emphasis added).

Over time, the Legislature has enacted into law statutes which supplement Section 3. In 1856, the Maine Legislature passed "An Act for the better security of the state treasury." P.L. 1856, ch. 243. Much of the act survives today as sections 124, 125, 126, 127, 136 of Title 5. Section 2 prohibited personal use of state monies and contained the word "business."

> The treasurer of the state *shall not use in his own business, nor for his own benefit,* any of the moneys of the state, nor shall he loan any of the moneys of the state to any persons, corporation or corporations, except when authorized so to do by law…upon pain of forfeiting a sum equal to the amount so used or loaned.

Id. § 2, *see* now, 5 M.R.S. § 125. It must be assumed that the Legislature was aware of the constitutional prohibition against engaging in any business of trade or commerce, and it must therefore be presumed that Section 2 was not intended to delimit the scope of the constitutional provision. The statute addresses a different concern – personal use of state funds.

Certainly, this statute was violated in an 1860 scandal involving then state treasurer, Benjamin Peck. Elected treasurer in 1857, 1858, and 1859, Mr. Peck invested heavily in a timberland venture using state funds, and used his position as state treasurer to obtain other funds. When the shortfall in the state treasury and the circumstances of Mr. Peck's finances became known in

late 1859, he was jailed in Bangor for a period before being brought to Augusta for questioning by a joint select legislative committee co-chaired by James G. Blaine. The resulting extensive report details the financial web of involved banks and investors as well as the techniques and subterfuges employed to disguise the fact that the monies belonged to the State. Nowhere in the report is there mention of the constitutional prohibition against engaging in trade or commerce but, of course, Mr. Peck was no longer in office by then. *Report of the Joint Select Committee on the Defalcation of Benjamin D. Peck* (1860).[2]

The application of the federal statute has more history. In analyzing whether certain Department of Treasury positions authorized in an 1817 act were subject to the prohibitions of section 8 of the 1789 Treasury Act, U.S. Attorney General Nathan Clifford[3] offered this interpretation of its purpose,

> One of the principal objects of the restriction was to withdraw from the accounting officers of the treasury every motive of private interest in the performance of their public duties, and to guard the nation from the consequences frequently to be apprehended when the business affairs of public officers are suffered to lie commingled with the financial concerns of the country.

4 U.S. Op. Atty. Gen. 555 (March 15, 1847).

In 1869, President Grant nominated Alexander T. Stewart to the office of Secretary of the Treasury. He was unanimously confirmed by the Senate but

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[2] A contemporaneous New York Times newspaper article can be found at: http://www.nytimes.com/1860/03/13/news/confessions-defaulter-history-maine-defalcation-confession-benj-d-peck-late.html?pagewanted=all .

[3] Nathan Clifford had a long public service career. It included serving as Maine's Attorney General from 1834-1838, U.S. Attorney General from 1846-1848 and an appointment to the U.S. Supreme Court in 1858 where he served until his death in 1881.

almost immediately questions began surfacing about the legality of his appointment given his business interests and the 1789 statute. 9 American Annual Cyclopedia and Register of Important Events of the Year 1869 (1870) at 695-696 (American Annual Cyclopedia). "Mr. Stewart was largely engaged in trade in the city of New York, and it thus became necessary for him to retire from business, or decline the appointment." *Id.* at 695. On March 6, President Grant sent the Senate the following message:

> Since the nomination and confirmation of Alexander T. Stewart to the office of Secretary of the Treasury I find that by the eighth section of the act of congress approved September 2, 1789, it is provided as follows, …[quoting section 8]
>
> In view of these provisions and the fact that Mr. Stewart has been unanimously confirmed by the Senate, I would ask that he be exempted by joint resolution of the two Houses of Congress from the operations of the same.

7 Messages and Papers of the Presidents (Richardson ed. 1898) at 8-9.

On March 9, the President withdrew his request. *Id. at 9*. In a letter dated the same day, withdrawing as Secretary of Treasury, Mr. Stewart explains that:

> Could the difficulties presented by the provisions of the act of 1789, …which prohibit the Secretary from being 'directly or indirectly concerned or interested in carrying on the business of trade or commerce,' be overcome by reasonable personal sacrifice to myself, I would willingly make it. I would promptly transfer, to the hands of gentleman in whom the public have felt confidence, every interest in the gains and profits that could possibly accrue to myself in the business of my house during my official term, to be applied to such charities as their judgment should dictate – and have proposed and sought by the execution of appropriate instruments, to accomplish that end; but serious differences of opinion have been expressed as to whether that course would satisfy the requirements of the law… Although I will not hesitate to make this appropriation, provided it would enable me to accept

> the office,…yet, the business relations of my firm…are such that they cannot be severed summarily, nor can my interest in it be wholly and absolutely disposed of without … . loss to those with whom I have been so long connected.

American Annual Cyclopedia at 696.

In 1929, the U.S. Attorney General was asked about section 8 of the 1789 Act and the eligibility of Andrew Mellon for the office of Secretary of Treasury. The Attorney General relied on the following facts in deciding that the 1789 statute did not preclude him from being a stockholder in a corporation while serving in the office:

> The facts with respect to Mr. Mellon's business activities, as explained in the papers submitted to me, show that while he owned stock in a number of corporations, before becoming Secretary of the Treasury he ceased to be an officer or director in any of them, and in none of them does he own a majority of the stock, nor does he give his time or attention to the active conduct of any incorporated business. The question comes down to the single one whether the statute quoted makes it unlawful for the Secretary of the Treasury to be a stockholder in any corporation engaged in trade or commerce.

36 U.S. Op. Atty. Gen. 12 (April 18, 1929) at 3. The U.S. Attorney also relied on the principle that owning stock in a corporation did not constitute carrying on the business of the corporation.

The Questions

> "Question 1. Does the mere ownership of business interests or stock by the Treasurer of State constitute engaging in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader as such terms as used in the Constitution of Maine, Article V, Part Third, Section 3?"

The only answer that this Office can tender to Question 1 as propounded is *it depends* on the nature of facts that might underlie the question but are not presented to the Justices. The Treasurer's mere ownership interest in a business may raise problems depending upon the circumstances. The phrase "mere ownership" in the absence of facts is not specific enough to allow real analysis. The word "business" covers a broad spectrum of activity.[4] Likewise, "trade or commerce" has been broadly defined. For example, Maine's Unfair Trade Practice Act provides:

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[4] The American Heritage Dictionary definition in relevant part is:
1.
a. The occupation, work, or trade in which a person is engaged: *the wholesale food business.*
b. A specific occupation or pursuit: *the best designer in the business.*
2. Commercial, industrial, or professional dealings: *new systems now being used in business.*
3. A commercial enterprise or establishment: *bought his uncle's business.*
4. Volume or amount of commercial trade: *Business had fallen off.*
5. Commercial dealings; patronage: *took her business to a trustworthy salesperson.*
6.
a. One's rightful or proper concern or interest: *"The business of America is business" (Calvin Coolidge).*
b. Something involving one personally: *It's none of my business.*
7. Serious work or endeavor: *got right down to business.*
8. An affair or matter: *"We will proceed no further in this business" (Shakespeare).*
The American Heritage Dictionary of the English Language, 4th ed. 2000, updated 2009, accessed at http://www.thefreedictionary.com/business.

> "Trade" and "commerce" shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

5 M.R.S.A. § 206(3). The range of possible hypothetical scenarios posited by Question 1 is simply too broad in the absence of specific facts to allow analysis.

For example, although stock ownership may be permissible, a substantial stock interest in a bank with which the State engages in business could create a problem, as was the case with a nominee for the position of Commissioner of Finance and Administration. *See Opinion of Justices,* 330 A.2d at 916-919; 5 M.R.S. § 125 (the Treasurer "shall not loan or use in his own business, or for his own benefit, any [interest, premium, gratuity or benefit by reason of any money belonging to the State, or of any loan obtained for the State], or permit any other person to do so, unless authorized by law, on pain of forfeiting a sum equal to the amount so used or loaned, to be recovered by indictment."). It would appear that the Treasurer's "legal trust" should be at least as stringent as those for a non-constitutional officer, whether or not such interest fell within a strict reading of "engag[ing] in any trade or commerce."

> "Question 2. If the answer to Question 1 is in the affirmative, would the Treasurer of State be engaged in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader if the Treasurer did not manage or involve himself in the day-to-day activities of such business interests or stock?"

Generally, as explained in our February 10 opinion, at 5, the intent of Section 3 is "to require the Treasure to make a full-time commitment, to give full fidelity to the job of Treasurer, and to preclude him from engaging in or carrying on a trade or business that would divert his attention from this commitment." The application depends in part upon what those business interests are, such as a bank overseeing the issuance of bonds. In this situation, it would appear that the Treasurer should not hold such interests, either under Section 3 or the common law "legal trust." *See e.g.,* 17 M.R.S. § 3104; *Opinion of Justices,* 330 A.2d at 916-919 (discussion of legal trust).

> "Question 3. If it is determined that the Treasurer of State has engaged in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader, does that finding affect or have an impact on the validity of the actions taken by the Treasurer of State in the performance of his official duties as used in Constitution of Maine, Article V, Part Third, Section 3?"

This Question appears to be seeking an assessment of the potential consequences should the Treasurer engage in any business or trade or commerce. In the past, the Justices seem particularly hesitant to answer such questions. *Opinion of Justices,* 396 A.2d 219 (Me. 1979) (declining to answer questions regarding impact of election of particular candidate for Attorney General).

We have not uncovered any precedent in Maine regarding the impact on the validity of a Treasurer's actions where the Treasurer has engaged in any business of trade or commerce. The Treasurer is covered by a bond. Me. Const. art. V, pt. 3, § 2 ("Bond. The Treasurer shall, before entering on the duties of that office, give bond to the State with sureties, to the satisfaction of the Legislature, for the faithful discharge of that trust."); 5 M.R.S. § 122 (Treasurer required to give bond with at least 2 surety companies of not less than the penal sum of $500,000); *see State v. Peck*, 58 Me. 123 (1870).

We have identified the following statutory provisions that may play a role depending upon the nature of a violation of Section 3. Title 17 M.R.S. § 3104, entitled "Conflicts of interest; purchases by the State," provides: "No trustee, superintendent, *treasurer* or other person holding a place of trust in any state office or public institution of the State shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the State or of the institution in which he holds such place of trust, and any contract made in violation hereof is void." (Emphasis added). *See Lesieur v. Inhabitants of Rumford*, 93 A. 838, 113 Me. 317 (1915) ("it is the policy of the state that persons, whom the law has placed in positions where they may make, or be instrumental in making, or in superintending the performance of, contracts in which others are interested, should not themselves be personally interested in such contracts."); *In re Opinion of the Justices*, 82 A. 90, 108 Me. 545 (1911) (discussing contract involving Secretary of State). There are a wide variety of actions that the Treasurer takes. 5 M.R.S. §§ 121-155. Any transaction involving an

institution in which the Treasurer has *any* pecuniary interest under this statute "is void." The common law, too, may provide a remedy to void transactions in which the Treasurer has a pecuniary interest. *See Tuscan v. Smith,* 153 A. 289, 293-94 (Me. 1931) (discussing court authority to void a contract involving a town official's conflict). Finally, if the Treasurer obtains a loan from or profits from money belonging to the State, he will "forfeit[] a sum equal to the amount so used or loaned, to be recovered by indictment." 5 M.R.S. § 125; *id.* at § 126 (Attorney General to prosecute Treasurer's violations).[5]

CONCLUSION

For these reasons, the Justices need not opine on the Questions because they do not present a solemn occasion.

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[5] In addition, the Treasurer is covered by Title 5 M.R.S. § 18(2), which provides that he commits a civil violation if he personally and substantially participates in his official capacity in any proceeding in which, to his knowledge, any of the following have a direct and substantial financial interest:

> **A.** Himself, his spouse or his dependent children;
> **B.** His partners;
> **C.** A person or organization with whom he is negotiating or has agreed to an arrangement concerning prospective employment;
> **D.** An organization in which he has a direct and substantial financial interest; or
> **E.** Any person with whom the executive employee has been associated as a partner or a fellow shareholder in a professional service corporation … during the preceding year.

"Proceeding" is broadly defined to include the award of a contract (*id.* at § 18(1)(D)), which would encompass the sale of any bond. And, of course, the Treasurer may be subject to impeachment or address, Me. Const. Art. 9, section 5; Art. 4, part 2, section 7; or removal, 5 M.R.S. § 127.

Dated: March 16, 2012

Respectfully submitted,

WILLIAM J. SCHNEIDER
Attorney General

PAUL STERN[6]
Deputy Attorney General
Bar No. 2310
paul.d.stern@maine.gov
Tel. (207) 626-8568

LINDA PISTNER
Chief Deputy Attorney General

WILLIAM LAUBENSTEIN
Assistant Attorney General
6 State House Station
Augusta, Maine 04333-0006
Fax (207) 287-3145

[6] Alice E. Sproul of this Office made substantial contributions to this brief.

ADDENDUM

TABLE OF CONTENTS

William J. Schneider
ATTORNEY GENERAL

TEL: (207) 626-8800
TTY: 1-800-577-6690

STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES:
84 HARLOW ST., 2ND FLOOR
BANGOR, MAINE 04401
TEL: (207) 941-3070
FAX: (207) 941-3075

415 CONGRESS ST., STE. 301
PORTLAND, MAINE 04101
TEL: (207) 822-0260
FAX: (207) 822-0259

14 ACCESS HIGHWAY, STE. 1
CARIBOU, MAINE 04736
TEL: (207) 496-3792
FAX: (207) 496-3291

February 10, 2012

Representative Mark Dion
2 State House Station
Augusta, Maine 04333-0002

Dear Representative Dion:

I am writing in response to your letters of January 17, 2012 and January 30, 2012, in which you inquired whether the State Treasurer has engaged in "any business of trade or commerce" within the meaning of the Maine Constitution, art. V, pt. 3, § 3 ("Section 3"). Your question focuses on the Treasurer's ownership of the Popham Beach Club located in Phippsburg, Maine.[1] Subsequent to our receipt of your letters, we became aware that a similar question has been raised concerning the Treasurer's real estate development activities through his company Dirigo Holdings, LLC.

There is very little guidance concerning the proper application of Section 3. The Maine courts have never addressed it. The two Attorney General opinions that have been issued consider the broad question of what is prohibited by Section 3 but do not apply it to any actual fact pattern. The United States Attorney General issued an opinion in 1929 in which he concluded that Secretary of the Treasury Andrew Mellon's ownership of stock was not in violation of a federal statute with language very similar to that of Section 3, but there do not appear to be any subsequent opinions or any judicial analysis of this language. 36 U.S. Op. Atty. Gen. 12 (April 18, 1929).

As a result, it is difficult to predict how a court would address the question before us. The federal authority, as well as the language of Section 3 and Maine statutes governing the Treasurer, supports his ability to continue to hold stocks during his tenure in office, provided that he does not undertake activity on behalf of any entity in which he owns stock. In this regard, we note that in the U.S. Attorney General's 1929 opinion, he commented favorably on Andrew Mellon's ceasing to be an officer or director before he became Secretary of the Treasury and

[1] While the focus of your inquiry is art. V, pt. 3, § 3 of the Maine Constitution, Title 5, Section 122, of the Maine Revised Statutes, is also relevant to the issue you have raised. This section provides in relevant part: "The condition of the Treasurer of State's bond shall be for the faithful discharge of all the duties of his office, and that during his continuance in office he will not engage in trade or commerce, or act as broker, agent or factor for any merchant or trader..." We note that the bonds now in effect do not expressly address engagement in trade or commerce.

further noted that although he owned stock in a number of corporations, in none of them did he own a majority interest nor did "he give his time or attention to the active conduct of any incorporated business." *Id.* at 3.

FACTS

A. Popham Beach Club. Our inquiry into the Popham Beach Club (the "Club") reveals the following: The Treasurer, Bruce Poliquin, is the owner of the Club, which is located on a parcel of land located in Phippsburg, Maine. The real estate on which the Club is located also is owned by the Treasurer. All revenues and expenses of the Club are attributed personally to Mr. Poliquin.

The Club employs a manager who is responsible for the day-to-day operation of the Club. The manager's duties include the hiring of personnel, arranging for work at the Club with private contractors and making decisions on membership applications. The manager is not involved with the finances of the Club and does not have a role with regard to local permit applications. The Club has three employees, including a groundskeeper and a bookkeeper. According to the manager, she rarely speaks with Mr. Poliquin and he does not give her direction with regard to the management and operation of the Club. Mr. Poliquin states that he visits the Club infrequently, that he considers the Club to be a "passive investment" and that he has no active involvement in the management of the Club. He has further stated that he does review financial records of the Club.

The Club maintains a checking account; Mr. Poliquin alone has signatory authority for the account. All invoices for the Club are paid from the Club checking account. The real estate taxes on the property are paid from the Club account; all utilities for the Club are in the name of Mr. Poliquin. For any Club initiative, work or invoice not in the ordinary course of business, the bookkeeper or the manager contacts Mr. Poliquin. The Club is not organized as a separate entity and does not file a separate tax return. All expenses of the Club are paid by Mr. Poliquin.

B. Dirigo Holdings, LLC. Dirigo Holdings, LLC, is a Domestic Limited Liability Company organized under the laws of Maine and registered in Maine (the "Company"). Documents on file with the Maine Secretary of State indicate that Bruce L. Poliquin is the Clerk/Registered Agent and that the management of the Company is vested in the members. Mr. Poliquin has stated that he is the sole member of the Company.

The primary business of the Company is the development of the Popham Woods Condominiums located in Phippsburg, Maine. The Phippsburg Real Estate Tax Commitment Book for 2012 lists five properties in the name of the Company, "ATTN: Bruce L. Poliquin, 186 Ledgemere Rd.,Georgetown, Maine." Properties at the Popham Woods Condominium are currently being marketed by Allen & Selig Reality. A Site Location Development Order issued by the Maine Department of Environmental Protection issued in April 2007 states that Dirigo Holdings (the "Applicant") planned to develop a 183 acre parcel with a 69-unit condominium development; that the estimated project cost is $17,279,000; and that the Applicant intended to self-finance the proposed project.

Mr. Poliquin has stated that he periodically provides funds for payment of expenses of Dirigo Holdings and Popham Woods Condominium and that Dirigo Holdings employs a manager and bookkeeper who are responsible for the operation and management of the Company. Mr. Poliquin further states that he periodically consults with the manager and bookkeeper. The bookkeeper for the Company is the bookkeeper for the Popham Beach Club. As is the case with the Popham Beach Club, there is a Company bank account for which Mr. Poliquin alone has signatory authority. Mr. Poliquin is the president of the Popham Woods Condominium Unit Owner's Association.

ANALYSIS

Article V, part 3, section 3 provides in its entirety as follows:

> The Treasurer shall not, during the treasurer's continuance in office, engage in any business of trade or commerce, or as a broker, nor as an agent or factor for any merchant or trader.

There is no judicial decision construing this provision of the Constitution, which has remained the same since its adoption in 1820. An opinion of the Attorney General dated January 23, 1923 sought to define the key terms in Section 3 with reference to the dictionary and court decisions construing "trade" or "business" in other contexts, and reached this conclusion:

> ...[O]ne holding the office of treasurer of the State of Maine is prohibited from engaging during his term of office in any business, and by that is meant any occupation or employment pursued as a calling, not of course including the learned professions, in which a person is engaged for procuring subsistence or for profit.

Op. Me. Att'y Gen. (January 23, 1923).

The only other Attorney General opinion we have found on the proper construction of Section 3 was issued in response to a general question from the Treasurer; neither opinion seeks to apply the language of Section 3 to a specific set of facts. This 1978 opinion notes that the original statute authorizing the office of Treasurer contained language similar to that of Section 3 prohibiting engagement in any business of trade. The original laws governing the office of the Treasurer also provided for his removal from office if he was absent from the State or from the duties of his office; these provisions were both grounded in the requirement that the Treasurer give full time to the duties of his office. Op. Me. Att'y Gen. (December 1, 1978) at 2. The language prohibiting the Treasurer from engaging in business was then adopted as part of the Maine Constitution. The opinion concludes:

> ... [W]e must conclude that the position of Treasurer, by operation of the provisions of Article V, Part 4 [sic], Section 3, requires a full-time commitment and full fidelity to the job such that other employment or the seeking of income through the regular practice

> of a profession outside of the office of Treasurer would not appear to be consistent with the intent of the original Constitution.

Op. Me. Att'y Gen. (December 1, 1978) at 2.

The opinion also considers the ability of the Treasurer to receive income from other sources during his tenure in office.

> The laws and constitution of the State do not bar the Treasurer from receiving income from other sources during his tenure in office. However, the practices which result in receipt of that income and sources of the income would have to be examined on a case-by-case basis to determine whether the Treasurer was engaging in business to gain the income or whether the source of the income created a conflict of interest for the Treasurer...

Id.

The 1929 opinion of the U.S. Attorney General construes language in federal law that is similar to that of Section 3.

> No persons appointed to the Office of Secretary of the Treasury, or Treasurer, or Register, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce...

5 U.S.C. § 243 (formerly), see now 31 U.S.C. § 329.[2]

Unlike Section 3, at the time of the U.S. Attorney General's opinion, the federal prohibition applied to direct or indirect interests, and might therefore be read as stricter than the provision in the Maine Constitution. However, the only issue considered in this context was the ability of the Treasurer to own stock, given that before becoming Secretary of the Treasury Mr. Mellon had ceased to be an officer or a director in any corporation, did not own a majority of the stock, and he did not give his time or attention to the active conduct of any incorporated business. 36 U.S. Op. Atty. Gen. 12 (April 18, 1929) at 3. The U.S. Attorney General concluded that the Treasurer could receive income from stocks under these circumstances. We believe it is reasonable to read the language of Section 3 to be consistent with that conclusion.

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[2] Current 31 U.S.C. § 329 reads in pertinent part:
Limitations on outside activities
(a)(1) The Secretary of the Treasury and the Treasurer may not--
(A) be involved in trade or commerce;
(B) own any part of a vessel (except a pleasure vessel);
(C) buy or hold as a beneficiary in trust public property;
(D) be involved in buying or disposing of obligations of a State or the United States Government; and
(E) personally take or use a benefit gained from conducting business of the Department of the Treasury except as authorized by law.

CONCLUSION

The prohibition in Section 3 of the Constitution is general and without limitation. The history of Section 3 and its predecessor statute demonstrates the intent to require the Treasurer to make a full-time commitment, to give full fidelity to the job of Treasurer, and to preclude him from engaging in or carrying on a trade or business that would divert his attention from this commitment. It is reasonable to conclude that Section 3, like the comparable federal statute, permits the Treasurer to continue to hold personal investments, such as stocks and bonds, while in office, given that there is nothing in the Maine Constitution or in statute that requires divestiture. It is also clear that the Treasurer cannot accept other employment or provide services to others while in office. There is no language, history or precedent identifying any activities the Treasurer may engage in with respect to his personal investments and business ventures without violating Section 3.

With respect to the Treasurer, any activities related to the active management of stock or other ownership interests should be handled by third persons in the absence of any authority suggesting that such activities are acceptable when undertaken directly. During the Treasurer's term in office he should take steps to disassociate himself from the active management of any of the entities in which he is invested and any entities in which he is the sole owner or principal or agent. Furthermore, he should not appear before any governmental bodies on behalf of entities that he owns.

I hope that this information and analysis proves to be useful.

Sincerely,

William J. Schneider
Attorney General

cc: Bruce, Poliquin, State Treasurer
Paul LePage, Governor
Senator Kevin Raye, Senate President
Representative Bob Nutting, Speaker of the House
Senator Barry Hobbins, Senate Minority Leader
Representative Emily Cain, House Minority Leader

36 U.S. Op. Atty. Gen. 12, 1929 WL 1712 (U.S.A.G.)

United States Attorney General

**1 ELIGIBILITY OF MR. MELLON FOR THE OFFICE OF SECRETARY OF THE TREASURY

April 18, 1929

The head of an Executive Department, with the exception of the Postmaster General, may legally continue to hold his office after the expiration of the term of the President by whom he was appointed at the pleasure of the President for the time being.

Under the statutory provision set forth in Senate Resolution 2, 71st Congress, special session, Mr. Andrew W. Mellon is not disqualified from holding the office of Secretary of the Treasury.

To the PRESIDENT.

SIR:

By letter of March 9, 1929, sent at your direction, your Secretary forwarded to me a copy of Senate Resolution 2 of the special session of the Senate of the Seventy-first Congress, with the request that I give you my opinion on the questions involved. These questions were:

'1. Whether the head of any department of the Government may legally hold office as such after the expiration of the term of the President by whom he was appointed.

'2. Whether in view of the provisions of the laws of the United States Andrew W. Mellon may legally hold the office of Secretary of the Treasury, reference being made to section*13 243 of Title 5 of the Code of Laws of the United States,' which is set forth in full,

'and to section 63 of Title 26 of the Code of Laws of the United States,'

also set forth in full. These questions will be discussed in order.

I assume that the words 'the head of any department of the Government' are intended to refer to the heads of the Executive Departments, which together are commonly called the Cabinet, and shall treat the question on that assumption. I have no doubt whatever that the head of each of these departments, with the exception of the Postmaster General, whose case is governed by a special statute, may continue to hold the office to which he has been appointed, after the expiration of the term of the President by whom he was appointed and as long as the incumbent of the office of President wishes him to serve.

While the President may, at pleasure, remove any executive officer, and while Congress may limit the term for which any executive officer may be appointed (*Myers* v. *United States*, 272 U. S. 52, 129), there is no provision in the Constitution which limits the term to which the head of a department may be appointed, nor, except in the case of the Postmaster General, is there at the present time any statute which fixes any limit.

As the statutes creating these offices do not otherwise provide for the making of appointments thereto, Article II,

6

section 2, of the Constitution empowers the President to make the appointments by and with the advice and consent of the Senate. As no term of office is fixed, the commissions may authorize the officer to hold office during the pleasure of the President (1 Op. 212), and this does not mean merely the President who made the appointment, but includes the incumbent of the position at any time thereafter. (2 Op. 410.)

The practical construction given to the commissions issued to heads of Executive Departments seems to have been uniform since 1789 to the effect that a commission does not expire on the death of a President nor at the end of a President's term of office. In 1831 Attorney General Berrien, in ***14** an opinion to the Secretary of the Treasury, discussed this subject at considerable length. (2 Op. 410.) In the course of his opinion he referred to the English common law principle that commissions granted by the King expired on the King's demise, the theory being that the King was the fountain of dignity and honor and that it was his prerogative to issue all commissions. Such a theory, he said, did not apply to our institutions. In this country the President is the appointing power, but it is in the people alone that sovereignty resides. He pointed out that the commissions actually issued have been 'during the pleasure of the President for the time being' and said:

****2** 'This form of issuing the commission serves to show the practical interpretation of this doctrine, which has prevailed since the foundation of this Government.'

He sums up his conclusion as follows (p. 412):

'When an office is held during the pleasure of any designated officer, it is at the pleasure of the *officer*, and not of the *individual;* and to determine that office otherwise than by the act of the immediate incumbent, there must be some official act indicative of the will of the officer at whose pleasure it is held. If he ceases his official functions, without having done any act indicative of his will, his appointee must necessarily hold over until a successor is appointed, who is vested with a like discretion.'

Historically, it seems to have been generally agreed that upon the death of the President or the expiration of his term no reappointment or new commission was necessary in the case of such officers as the new President wished to retain. There are many instances of such officers holding over under different Presidents, some of which will be mentioned hereafter as illustrations. In the absence of any constitutional or statutory provision to the contrary, and in view of the practical construction, beginning with the foundation of the Government, I can see no ground to support the view that upon the termination of one administration the President is required to submit to the Senate for confirmation the names of those then occupying positions as heads of executive departments whom he wishes to continue in office, except in the case of the Postmaster General. With respect to the latter officer, the Act of June 8, 1872 (ch. 335, ***15** 17 Stat. 283), an Act to review, consolidate, and amend the statutes relating to the Post Office Department, contained in section 2 a provision that the term of the office of the Postmaster General should be for and during the term of the President by whom he was appointed 'and for one month thereafter unless sooner removed.'That provision was carried into section 388 of the Revised Statutes and is now section 361 of Title V of the United States Code. The tenure of the Postmaster General, therefore, is peculiar.

Secretary Mellon's commission by its terms authorizes him to hold office 'during the pleasure of the President of the United States for the time being,' and this has been the usual form of commissions of this character from the beginning of the Government. It is unnecessary to mention them all, but the following illustrations show the practical construction which has been placed upon the question of duration of tenure of the heads of the executive departments:

Mr. Pickering was commissioned Secretary of State on December 10, 1795, and continued to hold that office until May 12, 1800, without a new commission being issued under President Adams. So, also, Secretary of the Treasury Wolcott, Secretary of War McHenry, Attorney General Lee, and Postmaster General Habersham, commissioned by President Washington in his second term, continued into and through the administration of President John Adams without new commissions.

7

**3 Mr. Gallatin served as Secretary of the Treasury from January 26, 1802, until February 9, 1814, under one commission. So, also, Mr. Madison served as Secretary of State from March 5, 1801, until March 3, 1809, with but one commission. All the members of President Jackson's Cabinet who were in office when his term expired continued to serve under President Van Buren without new commissions.

Though not strictly within the terms of the question, it may be noted that the members of the Cabinets of Presidents William Henry Harrison, Lincoln, Garfield, and McKinley continued to serve under the succeeding President without new commissions.

It seems too clear to admit of doubt that, with the exception of the Postmaster General, all heads of departments *16 continue to hold office from the time they are commissioned until death, resignation, or removal ends their tenure.

The second question involves the construction of section 243, Title V, United States Code, which provides:

' No persons appointed to the office of Secretary of the Treasury, or Treasurer, or Register, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea vessel, or purchase by himself, or another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States.'

The section contains other provisions not now material, and makes every person who violates its provisions guilty of a high misdemeanor, and, upon conviction, imposes the penalty of removal from office and disqualification for holding thereafter and office under the United States.

The facts with respect to Mr. Mellon's business activities, as explained in the papers submitted to me, show that while he owned stock in a number of corporations, before becoming Secretary of the Treasury he ceased to be an officer or director in any of them, and in none of them does he own a majority of the stock, nor does he give his time or attention to the active conduct of any incorporated business. The question comes down to the single one whether the statute quoted makes it unlawful for the Secretary of the Treasury to be a stockholder in any corporation engaged in trade or commerce.

Section 243 originated in the Act of September 2, 1789 (ch. 12, sec. 8, 1 Stat. 65, 67), the Act creating the Treasury Department. Though referred to in *Ex parte Curtis*, 106 U. S. 371, 373 (4 Op. 555, 25 Op. 98), there seems to be no authority which tends to throw a clear light upon the precise meaning and application which it was intended to have. The discussion, if any, which attended its adoption is not reported in the Annals of Congress or in Maclay's Journal.

The papers submitted to me contain an opinion by William S. Morehead, Esq., dated April 2, 1924, given to Secretary Mellon, and also one by Messrs. Faust & Wilson, dated January 25, 1921, given to Senator Knox, and read into the *17 Congressional Record by Senator Reed, of Pennsylvania. Each reaches the conclusion that there is nothing in the statute which disqualifies Mr. Mellon from holding the office of Secretary of the Treasury because of his ownership of corporate stocks. They are based upon judicial decisions which support the principle, now well established, that the ownership of stock in a corporation does not constitute carrying on the business of the corporation. Among them are *In re Deuel*, 127 App. Div. 640, holding that Judge Deuel was not disqualified to hold the office of Justice of the Court of Special Sessions of the State of New York under a statute which forbade such a Justice to 'carry on any business.' Judge Deuel was vice president of a publishing corporation, but the court held that this did not offend the statute, as the term carrying on business implied 'such a relation to the business as identifies the person with it, and imposes upon him some duty or responsibility in connection with its management.'

**4 A similar case is *In re Levy*, 198 App. Div. 326, which held that Judge Levy, a stockholder but not a director or officer of any corporation, had not offended against a statute which said that no Justice shall 'engage in any other

8

business or profession.'

In the case of *Cooper Manufacturing Co. v. Ferguson*, 113 U. S. 727, 734, the Supreme Court, in construing the phrase 'to carry on,' said:

'The meaning of the phrase 'to carry on' when applied to business is well settled. In Worcester's dictionary the definition is: 'To prosecute, to help forward, to continue, as to carry on business.'The definition given to the same phrase in Webster's dictionary is: 'To continue, as to carry on a design; to manage or prosecute, as to carry on husbandry or trade.''

There are other cases which need not be mentioned. Any doubt which might exist seems to be solved by the decision of the Supreme Court in *United States v. Delaware & Hudson Co.*, 213 U. S. 366, which arose under the so-called commodities clause of the Hepburn Act of June 29, 1906 (ch. 3591, 34 Stat. 584), which made it unlawful for any railroad company to transport in interstate or foreign commerce—'any *18 article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.'

The Court held that this statute did not prohibit a railroad company from transporting articles or commodities 'manufactured, mined, produced, or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder.'(213 U. S. 415.) In reaching that conclusion Mr. Justice White, delivering the opinion of the Court, analyzed at length the purpose of the statute as shown by its language and construed in the light of the circumstances existing at the time of its passage, and held that its object was to prevent carriers engaged in interstate commerce from being associated in interest at the time of transportation with the commodities transported. Such being its purpose, he held that the ownership of stock in a producing company by a railway company did not establish a legal interest in the commodity manufactured by the producing corporation, and therefore did not offend against the statute. Any doubt which might exist seems to me to be laid at rest by this decision. The purpose of the statute as declared by the Court, and the holding of the Court in the light of the purpose as thus declared, when compared make it plain that the effect of the decision is that stock ownership in a corporation does not in contemplation of law give the stockholder any interest direct or indirect in the business which the corporation is carrying on.

While the forms of corporate investment familiar at the present time were comparatively uncommon in 1789, there were classes of people who derived an income from invested funds in contrast to those whose income was derived from operations of trade and commerce. I think we can say with assurance that the words of the statute would not be deemed by those who wrote it as appropriate words to describe one who simply received dividends from stocks which he owned and took no active part in the management or control of the corporations which issued them.

**5 *19 My conclusion is that Secretary Mellon is not disqualified from holding the office of Secretary of the Treasury by reason of the fact that he owns stock in business corporations. To give the statute any other construction would be to sacrifice the spirit to the letter, and under modern conditions would probably exclude from the office a great majority of the men most competent to hold and administer it efficiently without accomplishing any good.

Congress has not found occasion to amend the Act we are now considering by inserting any provision prohibiting stock ownership. In 1913, however, in enacting the Federal Reserve Act, it provided specifically that no member of the Federal Reserve Board should hold stock in any bank, banking institution, or trust company. (38 Stat. 261.) When, however, it enacted the Federal Farm Loan Act (in 1916; 39 Stat. 360) it provided that no member of the Federal Farm Loan Board should be an officer or director of any other institution, association, or partnership engaged in banking or in the business of making land-mortgage loans or selling land mortgages, but did not mention stock ownership. This may not be important, but it shows that Congress has had in mind the question of stock ownership as affecting a man's eligibility to hold certain offices, and, when it has deemed such ownership improper, has prohibited it.

9

The third question arises under Section 63 of Title XXVI, United States Code, as follows:

'SEC. 63. Interest in certain manufactures or production of liquors by revenue officers prohibited.—Any internal-revenue officer who is or shall become interested, directly or indirectly, in the manufacture of tobacco, snuff, or cigars, or in the production, rectification, or redistillation of distilled spirits, shall be dismissed from office; and every officer who becomes so interested in any such manufacture or production, rectification, or redistillation, or in the production of fermented liquors, shall be fined not less than $500 nor more than $5,000. The provisions of this section shall apply to internal-revenue agents as fully as to internal-revenue officers.'

The essential facts are set forth in the statement which Senator Reed, of Pennsylvania, made in the Senate on ***20** March 31, 1924 (65 Cong. Rec., pt. 5, pp. 5243–5249), and in an open letter by Mr. Mellon to Senator Caraway, dated October 2, 1928. It appears that at one time he held a partnership interest in a firm which distilled whisky, but that the operation of that firm ceased completely on December 15, 1916, and before March 4, 1921, the entire property of the firm was conveyed to a trustee under an irrevocable trust, with full authority in the trustee to dispose of the property, free from any control by those who were members of the partnership, but without power to operate the distillery. At the time Senator Reed made his statement the trustee had in its possession a considerable quantity of whisky, but the letter of October 2, 1928, to Senator Caraway states:

****6** 'The trustee executed the trust by disposing of the real estate, stock in hand, and other property in its entirety.'

It is therefore clear that even if the Secretary of the Treasury is an 'internal-revenue officer' or an 'internal-revenue agent' within the meaning of the statute, he has not been at any time since the became Secretary of the Treasury interested directly or indirectly in the 'production, rectification, or redistillation of distilled spirits.'This question does not call for further discussion. Even if Mr. Mellon had continued to own the whisky, the mere ownership of it in a warehouse could hardly be called production, rectification, or redistillation.

It is my opinion, therefore, and I so advise you: First, that the head of an Executive Department, with the exception of the Postmaster General, may legally continue to hold his office after the expiration of the term of the President by whom he was appointed at the pleasure of the President for the time being; and, second, that Secretary Mellon is not disqualified from holding the office of Secretary of the Treasury under the statutory provision set forth in the Senate Resolution by reason of any facts within my knowledge.

Respectfully,
WILLIAM D. MITCHELL.

36 U.S. Op. Atty. Gen. 12, 1929 WL 1712 (U.S.A.G.)

END OF DOCUMENT

January 23, 1923.

To Honorable Percival P. Baxter, Governor of Maine
Re: Qualifications of Treasurer of State

. . .Section 3 of Part Fourth of Article V of the Constitution states that

> "The treasurer shall not, during his continuance in office, engage in any business of trade or commerce, or an a broker, nor as an agent or factor for any merchant or trader."

This language is so plain that it is hard to understand how more than one interpretation can be put upon it, but apparently it has been construed at times by office holders not to mean what it says.

The construction of this section has never been before our courts, nor so far as I can find, has similar language been construed by any court, but the dictionary definitions of the words "trade", "commerce", "merchant" and "trader" are such as to indicate that one holding the office of treasurer of the State of Maine is prohibited from engaging during his term of office in any business, and by that is meant any occupation or employment pursued as a calling, not of course including the learned professions, in which a person is engaged for procuring subsistence or for profit.

In Huston v. Goudy, 90 Me. 128, it was held that one who bought and sold lumber, and sold mowing machines on a commission was a "trader" within the meaning of the term used in the statute; and in Gower v. Jonesboro, 83 Me. 142, the court construed "trade" as embracing "any sort of dealings by way of sale or exchange"; in State vs. Littlefield, 112 Me. 217, the court said:

> "Business, in a legislative sense, is that which occupies the time, attention, the labor of men for the purposes of livelihood or for profit, a calling for the purpose of a livelihood."

These definitions applied to the language of the Constitution seem to settle the matter beyond question.

William H. Fisher
Deputy Attorney General

11

5 MRSA 121
5 MRSA 127

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

December 1, 1978

Honorable Jerrold Speers
Memorial Drive
Winthrop, Maine 04364

Re: State Treasurer's Office.

Dear Senator Speers:

This responds to your request for an opinion on the question of whether the State Treasurer may, during his term of office, accept other employment or perform professional work for other compensation.

Response to this question requires an analysis of the provisions of the Maine Constitution and Maine statutes relating to the State Treasurer. Key to this analysis is Article V, Part 4, Section 3, of the Maine Constitution which reads as follows:

> "The Treasurer shall not, during his continuance in office, engage in any business of trade or commerce, or as a broker, nor as an agent or factor for any merchant or trader."

This provision, as it exists in the Maine Constitution today, has remained unchanged since original adoption of the Maine Constitution in 1820. Its language would appear to bar persons, while incumbent in the office of Treasurer, from engaging in a business or trade or acting as agents for persons engaged in business or trade.

The original statute authorizing the office of Treasurer contained similar language prohibiting engagement in any business or trade. Laws of 1820, c. 2, § 1. Further, the

12

original laws for the office of State Treasurer authorized persons to issue complaints against the Treasurer and authorized the Treasurer to be removed from office if the Treasurer was absent from the State or absent from "the duties of his said office." Laws of 1820, c. 2, § 2.

The implication of this language, in the original law, was that if the Treasurer was found to be giving less than his full fidelity and time to the office of Treasurer and if he was engaged in another business activity which resulted in his being absent from the duties of the office of Treasurer, a complaint could be filed and the Treasurer could be removed. The statutory language relating to the duties of office has not carried over to the current law. The provisions of the current law relating to removal of the Treasurer, 5 M.R.S.A. § 127, authorize removal where the Treasurer "is absent from the State and neglecting his duties to the hazard of the trust reposed in him."

The effect of the change from the original law appears to permit the Treasurer to go out-of-state without the threat of removal from office, action which a strict interpretation of the original statute may have allowed. However, we do not think the change in statutory language is significant to our interpretation since the original statute, adopted at the same time as the original Maine Constitution, must be construed to provide some indication as to the intent of the drafters of the Constitution with regard to the Treasurer engaging in any business or trade which might divert his attention from a full-time commitment to his job as Treasurer. Accordingly, we must conclude that the position of Treasurer, by operation of the provisions of Article V, Part 4, Section 3, requires a full-time commitment and full fidelity to the job such that other employment or the seeking of income through the regular practice of a profession outside of the office of Treasurer would not appear to be consistent with the intent of the original Constitution.

This opinion is given based on the legal and historical research which we have had time to do. An exhaustive legal and historical research into the background of the office of the Maine State Treasurer has not been possible in this time. We recognize that at the time the State of Maine was created in 1820, most State offices were not full-time offices. They were occupied by persons otherwise engaged in trades or professions. However, the limited legal and historical research which we have been able to do has not provided any indication that, like other State officials, the Treasurer also was a part-time position held by persons in other businesses. As this other research has been inconclusive, we must look to the apparent meaning of the Constitution which, as it reads in 1978, appears to require full fidelity to the position.

This does not, however, mean that a Treasurer of the State of Maine can receive no income, other than compensation for his services as Treasurer, while serving as Treasurer. There is nothing in the law or the Constitution that bars receipt of income from investments such as stocks or real estate so long as the Treasurer is not, during his term of office, engaging in another business. This interpretation is confirmed by the current law, 5 M.R.S.A. § 121, which bars the Treasurer from receiving other fees, emoluments or prerequisites in addition to his salary for the office of Treasurer, but cannot be interpreted to bar receipt of other outside income or benefit. In this connection, we are enclosing for your review a copy of an opinion to the State Energy Office dated August 23, 1978, which addresses this issue.

Obviously, each source of outside income would have to be examined both for the question of whether the Treasurer was engaging in a business or profession which compromised his ability to give full fidelity to the office of State Treasurer and also for the question of whether any source of outside income represents a common law conflict of interest for the Treasurer, which conflict of interest would be independent of any constitutional or statutory provisions addressed above.*

In sum, we must advise that:

1. The State law and the State Constitution require that the Treasurer, while in office, not engage in any other business or profession.

2. The laws and Constitution of the State do not bar the Treasurer from receiving income from other sources during his tenure in office. However, the practices which result in receipt of that income and the sources of the income would have to be examined on a case-by-case basis to determine whether the Treasurer was engaging in a business to gain the income or whether the source of the income created a conflict of interest for the Treasurer in his position as Treasurer.

I hope this information is helpful.

Sincerely,

DONALD G. ALEXANDER
Deputy Attorney General

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* For a discussion of common law conflicts of interest, see the opinion dated November 4, 1975, attached hereto.

5 MRSA 5005
17 MRSA 3104

JOSEPH E. BRENNAN
ATTORNEY GENERAL

RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

August 23, 1978

Honorable David Ault
Wayne
Maine 04284

Dear Representative Ault:

This responds to your request for advice, dated August 2, 1978, on the question of whether P.L. 1977, c. 685, was properly implemented by use of a public "lottery" device and whether a State Legislator or a State constitutional officer could be winners of a grant made pursuant to Chapter 685.

FACTS:

The second regular session of the 108th Legislature enacted P.L. 1977, c. 685, in order to establish a solar water heater demonstration program for the State of Maine. In so doing, the Legislature amended 5 M.R.S.A. § 5005 to authorize the State Office of Energy Resources to sponsor research experiments and demonstration projects within the State to develop alternative energy sources, including solar energy. Further, Chapter 685 appropriated $16,000 to the Office of Energy Resources to fund 40 grants of $400 each to qualified applicants for installation of solar hot water heating systems. No particular method for distribution of the grants was specified.

It is our understanding that it was contemplated that the grants would only pay a portion of the cost of a solar hot water heating system (from 1/3 to 1/6 of the total cost, depending on the type of system installed).

The Office of Energy Resources determined that it would give all Maine residents an equal opportunity to apply for these grants by making the public aware of their availability and selecting applicants by chance. Accordingly, the Office of Energy Resources advertised with quarter-page ads in the Saturday edition of the Bangor Daily News and the Maine Sunday Telegram. The ads stated that $400 grants were available, that people were urged to apply, and that applicants would be selected by lot.

15

In addition to these advertisements, the Office of Energy Resources put out news releases about the program, and in response to the news releases, several news stories about the availability of the grants appeared. Despite this publicity, only a small number of applicants, totalling approximately 138, were received. The Office of Energy Resources desired to have some geographic distribution of the grants in order to test solar systems in the various geographic and climatic regions of Maine. For that reason, and because of the low number of applicants, the applications which had been received were segregated by county and then the drawing was conducted on a county-by-county basis. There was at least one applicant for each county, but sometimes no more than one. After the various names had been drawn, it was determined that the State Treasurer and a State Legislator were among the successful applicants.

QUESTIONS:

Based on these facts, you have posed your questions:

1. Was the so-called lottery a proper procedure to use in issuing the grants pursuant to Chapter 685?

2. May the State Treasurer and the State Legislator be recipients of grants pursuant to Chapter 685 which were issued in the above-described manner?

ANSWERS:

We would answer your questions as follows:

1. There was no violation of the state gaming laws, 17-A M.R.S.A. c. 39, or of the state laws relating to operation of the state lottery, 8 M.R.S.A. c. 14, in use of the term "lottery" in connection with the grant application program or in the manner of selection of successful grant applicants. The program was not run in a manner similar to a statutorily prohibited gambling operation in that applicants were not required to risk any funds or other consideration which they would lose if they were not a successful applicant. Cf. 17-A M.R.S.A. § 952-4. Thus, only successful applicants must make commitments to spend their own funds in connection with the grant to build a solar heating system.

2. We also do not believe that the procedure used for the distribution of grants was improper on any other grounds based on the facts described above. As indicated, the Legislature provided no direction as to how the grants were to be distributed. In light

of this, we belive that it was within the reasonable discretion of the Office of Energy Resources to adopt the policies that the grants should be made widely available to Maine citizens and that grant recipients should have some significant geographical distribution to test the solar systems under varying climate and geographic conditions.

With these policies adopted, we do not think it was unreasonable for the Office of Energy Resources to proceed the way they did, initially to invite applicants on a state-wide basis, but subsequently to segregate applications on a county-by-county basis to assure geographic distribution.

3. The compensation to be paid to a State Legislator and the State Treasurer are specified at 3 M.R.S.A. § 2 (for legislators) and 2 M.R.S.A. § 7 and 5 M.R.S.A. § 121 (for the Treasurer). These sections set limits on the compensation which Legislators and the Treasurer respectively are to receive from the State for their services. Receipt of funds from the State in excess of these amounts would not be proper for services rendered in their official capacity. However, while the funds in question in this case are received from the State, they have no connection with services rendered. The grants have been awarded by lot without reference to any person's status as a State employee or State officer. Further, no work by any person in their capacity as a State officer or State employee is required as a condition of the grant. As the grant is unrelated to one's status as a State employee and unrelated to service rendered to the State, the grants are not compensation. Therefore, compensation limits specified for State Legislators and the State Treasurer are not violated.

4. It is our understanding that recipients will enter into agreements with the State committing the grantee to comply with certain requirements as a condition of the grant. State law, 17 M.R.S.A. § 3104, limits the ability of State employees to participate in contracts in which they may have an official interest. Section 3104 reads as follows:

> "No trustee, superintendent, treasurer or other person holding a place of trust in any state office or public institution of the State shall be pecuniarily interested directly or indirectly in any contracts made in behalf of the State or of the institution in which he holds such place of trust, and any contract made in violation hereof is void. This section shall not apply to purchases of the State by the Governor under authority of Title 1, section 814."

17

The State officials in question were in no position to influence the awarding of the contract in question, nor will they have any role (beyond the Treasurer's pro forma signature on checks) in administering the State program under which the grants will be provided.

The Maine Courts have considered an earlier version of § 3104 in Opinion of the Justices, 108 Me. 545 (1911). There, the Court found a conflict of interest barring a contract with a company in which the Secretary of State held a substantial interest where "the department of which he is the official head, will necessarily be affected to a considerable extent in the performance of the same." 108 Me. 545, at 552. Here, the State Treasurer's Department and the Legislature are not affected in any significant way by the performance of the contract. Further, the general purpose of the statute noted by the Court: to avoid the temptation to bestow reciprocal benefits and to prevent favoritism or fraudulent collusion, would not be compromised by the grants made under the energy conservation program.

Accordingly, it is our view, again based on the facts as described above, that the grants in question in this case, which have been awarded by lot, are not contracts within the meaing of § 3104, and further, that to the extent there is any such contractual relationship between the Office of Energy Resources and the grantees, the State officials in question do not have a sufficient relationship to the program to put themselves in a place of trust with regard to the grant such as would bring the provisions of § 3104 into play.

5. According to the above-stated facts, there is no question of any improper influence in awarding of the contracts or otherwise in the connection with the solar water heating program such as would bring the prohibitions of Chapter 25 of the Maine Criminal Code (Title 17-A) and particularly §§ 603, 604 or 605 into play.

Thus, it is the view of this office that the procedures used by the Office of Energy Resources for distribution of grants pursuant to Chapter 685 were not inconsistent with the laws of Maine. Further, we find no violation of the laws of the State in the State Treasurer and a State Legislator receiving a grant pursuant to Chapter 685 considering the manner in which such grants were distributed under Chapter 685.

I hope this information is helpful.

Sincerely,

JOSEPH E. BRENNAN
Attorney General

JEB/ec
cc: Leighton Cooney, Treasurer
Rep. Harry Rideout
Office of Energy Resources

JOSEPH E. BRENNAN
ATTORNEY GENERAL

JOHN W. BENOIT, JR.
RICHARD S. COHEN
MARTIN L. WILK
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

November 4, 1975

Honorable Carl E. Cianchette
Chairman, Executive Council
State House
Augusta, Maine 04333

Dear Carl:

This is in response to your request for an opinion whether Mr. Aaron Levine would be in conflict of interest serving as Commissioner of the Maine State Department of Agriculture if he continued to own stock in ALCO Packing Co., Inc.:

SYLIABUS:

A conflict of interest in violation of law would result if the controlling stockholder of the largest slaughterhouse and meatpacking concern in Maine simultaneously held the position of Commissioner of the State Department of Agriculture. The relationship of the controlling stockholder to his company would be inconsistent with the obligations and duties imposed upon the Commissioner of the Department of Agriculture.

FACTS:

The Governor has posted Mr. Aaron Levine to the position of Commissioner of the State Department of Agriculture. Mr. Levine is President and Chief Executive Officer of ALCO Packing Co., Inc., a corporation duly organized under the laws of Maine, engaged in the slaughterhouse and meatpacking business. Mr. Levine owns 79% of the voting stock of ALCO and serves on its Board of Directors.

ALCO is the largest meatpacking company in Maine. It is presently inspected solely by federal inspectors, and is engaged in interstate as well as intrastate commerce. There are several other slaughterhouses and meatpacking concerns in Maine engaged

solely in intrastate commerce which are inspected solely by state inspectors appointed by and acting under the supervision of the Commissioner of the State Department of Agriculture, pursuant to the Maine Meat Inspection Act, 22 M.R.S.A. §§ 2541-2589.

If confirmed by the Executive Council as Commissioner, Mr. Levine has indicated that he is prepared to resign as President and Director of ALCO and would disassociate himself from all the affairs of the company. He would not receive any salary from ALCO and would not be available for consultation with the company. Mr. Levine would prefer to retain his 79% ownership interest in ALCO while he serves as Commissioner of Agriculture.

At the public hearing before the Executive Council, there was testimony in opposition to Mr. Levine's appointment on the grounds that the appointment would result in a conflict of interest because of the nominee's proposed continued relationship to ALCO. The Executive Council has requested our opinion whether any conflict of interest would result under the foregoing facts.*

QUESTION AND ANSWER:

Whether Mr. Levine's retention of a 79% ownership interest in ALCO Packing Co. while serving as Commissioner of the Maine Department of Agriculture would constitute a conflict of interest? Yes.

REASONS:

In order to resolve conflict of interest questions, the Courts have looked to the common law. The criteria to be applied in such cases have been succinctly summarized in a recent conflict of interest Opinion of the Justices as follows (330 A.2d 912 at 916):

> "'[t]he law requires of . . . [public officers] perfect fidelity in the exercise of . . . [the powers and duties of their officer], . . . whatever has a tendency to prevent their exercise of such fidelity is contrary to the policy of the law, and should not be recognized as lawful. . . .' (emphasis supplied) (113 Me. p. 321, 93 A. p. 829)."

In the foregoing Opinion, the Justices addressed a question very similar to the instant one, namely: whether the ownership of stock in a national bank by a person who simultaneously serves as Commissioner

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* The facts were voluntarily furnished relating to the nominee's ownership interest in ALCO by Mr. Levine himself. There is no indication that ALCO would be doing any business directly with the State.

of the State Department of Finance and Administration results in a conflict of interest. It was the opinion of the Justices that such continued stock ownership, even if subjugated to a voting trust by the terms of which the prospective Commissioner would have no beneficial or voting rights while in State service, would constitute a conflict of interest in violation of law. Opinion of the Justices, 330 A.2d 912, 919.

Applying these principles to the instant case, it is our opinion that Mr. Levine's continued stock ownership, according to acknowledged attitudes fixed by the habits and customs of the people, would be held to be "inconsistent with the discharge of a full fidelity to the public interest," as Commissioner of Agriculture. Opinion of the Justices, 330 A.2d at 918; Tuscan v. Smith, 130 Me. 36, 46, 153 A. 289, 294 (1931); Lesieur v. Inhabitants of Rumford, 113 Me. 317, 321, 93 A. 838, 839 (1915).

The conflicts fall into essentially three categories: (1) regulation of competitors, (2) regulation of the corporation which he controls, and (3) regulation of persons with whom both his corporation and his competitors do business.

Regulation of Competitors

The Commissioner of Agriculture, and those officials appointed by him and who are subject to his control, posses plenary power and supervision over those establishments engaged in the slaughterhouse and meatpacking business in intrastate commerce. The Commissioner has the statutory responsibility for administering and promulgating rules and regulations under the Maine Meat Inspection Act, 22 M.R.S.A. §§ 2541-2589 (a copy of which is annexed hereto for convenient reference). Pursuant to the Act, the Commissioner has express powers and duties in the following areas:

a) inspection and examination, §§ 2543, 2544, 2545, 2546, 2549, 2553 (such examinations and inspections shall be made during the day and night, § 2549);

b) labeling, §§ 2547, 2551;

c) sanitation, § 2548;

d) identification, § 2552;

e) methods of slaughter, § 2554;

f) days for slaughter or operation, § 2549;

g) storage, § 2557;

h) handling, § 2557;

i) record keeping, § 2562;

j) registration, § 2563;

k) federal inspection, § 2571;

l) detention, § 2582; and

m) condemnation, § 2583.

State inspectors are appointed by the Commissioner, § 2553. Their duties and responsibilities are, by statute, under the direction of the Commissioner as follows:

> "[They] shall perform such other duties as are provided by this chapter and by rules and regulations to be prescribed by said commissioner and said commissioner shall, from time to time, make such rules and regulations as are necessary for the efficient execution of this chapter, and all inspections and examinations made under this chapter shall be such and made in such manner as described in the rules and regulations prescribed by said commissioner not inconsistent with this chapter." § 2553.

Slaughterhouse and meatpacking establishments regulated by the Commissioner are required to "keep such records as will fully and correctly disclose all transactions involved in their businesses," § 2562(1), and the Commissioner has express authority:

a) to gather any information covering, and to investigate, "the organization, business, conduct, practices and management of any person, firm or corporation engaged in intrastate commerce, and the relation thereof to other persons, firms and corporations." § 2587(1)(A),

b) to require those engaged in the meatpacking business to furnish "such information as he may require as to the organization, business, conduct, practices, management and relation to other persons, firms and corporations. . ." § 2587(1)(B),

c) to have access to and the right to copy "any documentary evidence of any person, firm or corporation being investigated or proceeded against. . ." § 2587(2),

d) "to subpoena the attendance and testimony of witnesses and the production of all documentary evidence of any person, firm or corporation relating to any matter under investigation." § 2587(2).

Pursuant to § 2571 of the Maine Meat Inspection Act, those businesses which are regulated by the State must meet standards and requirements "at least equal to those imposed under Titles I and IV of the Federal Meat Inspection Act. . . ." § 2571.

The State Commissioner of Agriculture has promulgated regulations which incorporate the federal regulations and make them applicable to all slaughterhouses and meatpacking concerns regulated by the State. Thus, although the requirements for federally inspected establishments such as ALCO and State inspected establishments are presently the same, the Commissioner of Agriculture has authority to promulgate more stringent requirements for state regulated concerns.

It is clear from the foregoing that Mr. Levine would have direct supervisory and comprehensive regulatory power over competitor slaughterhouse and meatpacking concerns as well as access to their detailed business records and every day transactions.

Regulation of ALCO

At the present time, ALCO itself is neither inspected nor regulated by the Commissioner of Agriculture or his appointed inspectors. Rather, ALCO is regulated by federal authorities. Nevertheless, the Maine Meat Inspection Act expressly provides that the requirements of the Act may be applied to federally inspected establishments in certain areas:

> "[the Act] shall apply to persons, firms, corporations, establishments, animals and articles regulated under the Federal Meat Inspection Act only to the extent provided in section 408 [21 U.S.C. § 678] of said Federal Act." 22 M.R.S.A. § 2588.

The Federal Act authorizes any state to "impose recordkeeping and other requirements. . .with respect to any such [federally inspected] establishment, and to exercise:

> "concurrent jurisdiction with the Secretary [of Agriculture] over articles required to be inspected . . . for the purpose of preventing the distribution for human food purposes of any such articles which are adulturated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States." 21 U.S.C. § 678.

By virtue of the foregoing provision, if Mr. Levine were to continue to own a 79% controlling interest in ALCO while he served as Commissioner of the State Department of Agriculture, he would, in effect, be in the position of regulating a corporation in which he owns the controlling interest.

In addition, the Commissioner of Agriculture administers a disease control program which applies to cattle slaughtered at federally inspected as well as state inspected slaughterhouses, including ALCO. 7 M.R.S.A. Chap. 303, § 1751, et seq.

Regulation of Persons With Whom Both ALCO and its Competitors Do Business

In addition to the duties imposed by the Maine Meat Inspection Act, the Commissioner of Agriculture regulates and licenses dealers of livestock and poultry, 7 M.R.S.A. §§ 1301-1308, and is authorized to promulgate rules and regulations with respect thereto, 7 M.R.S.A. § 1303. Pursuant to 7 M.R.S.A. § 1809, the Commissioner may require any person seeking to transport cattle into the state to obtain a permit prior to time of entry, and he may require examinations at the owner's expense. Accordingly, the Commissioner of Agriculture does possess statutory powers, the exercise of which could have a significant impact on those persons who raise or import beef cattle and who, in turn, may sell the same to ALCO for slaughter or packaging.

* * * * *

In summary, because ALCO is at least in some manner in competition with state inspected establishments, since it sells its products in intrastate as well as interstate commerce, any exercise of regulatory power with respect to state inspected concerns, or for that matter, failure to exercise regulatory power, would be particularly subject to public question.

Moreover, as a 79% controlling stockholder, he would have a direct pecuniary interest and personal stake in the continuing good fortunes of ALCO, Opinion of the Justices, 330 A.2d at 918. And, he would have authority to regulate the largest slaughterhouse and meatpacking establishment in Maine, a company in which he owns the controlling interest. These interests would be inconsistent with high obligations of trust and "perfect fidelity" which the Commissioner of Agriculture owes the public in the discharge of his statutory responsibilities. Tuscan v. Smith, supra; Lesieur v. Inhabitants of Rumford, supra.

Very truly yours,

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

JEB:mfe
Enclosure